NO. 82-1319

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

LOUIE L. WAINWRIGHT,
Secretary, Department of
Corrections,

Petitioner,

v.

ALFRED EUGENE GRIZZELL,

Respondent.

RESPONSE OF ALFRED EUGENE GRIZZELL TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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April 25, 1983

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE LOWER COURT APPLIED THE WRONG STANDARD OF REVIEW.

II. WHETHER THE LOWER COURT PROPERLY APPLIED THE PROVISIONS OF 28 U.S.C.A. § 2254(b).

III. WHETHER THE DECISION OF THE LOWER COURT DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE DECISION OF THIS COURT IN MICHIGAN v. TUCKER, 404 U.S. 443 (1972).

IV. WHETHER THE LOWER COURT ERRED IN CHARACTERIZING GRIZZELL'S ALIBI TESTIMONY AS DEMONSTRATING NO INTERNAL INCONSISTENCIES.

V. WHETHER THE LOWER COURT MISAPPLIED ZILKA v. ESTELLE, 529 F.2d 388 (5th Cir. 1976).

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STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement Of The Case.

REASONS FOR NOT GRANTING THE WRIT

I. THE LOWER COURT APPLIED THE CORRECT STANDARD OF REVIEW.

Petitioner complains that the lower courts employed an improper "conjectural standard" in determining whether the admitted constitutional error in Respondent's conviction was harmless beyond a reasonable doubt within the meaning of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1976). Petitioner also complains that the lower court failed to mention much less follow the principle of United States v. Frady, ___U.S. ___, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982). Petitioner's arguments are not only without substance, but they do not present the character of reason which justifies a review on writ of certiorari.

The constitutional infirmity in Respondent's conviction is not contested. The due process violation occurred when Respondent's credibility at trial was impeached by reference to prior counselless convictions subsequently held constitutionally invalid under Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Loper v. Beto, 405 U.S. 473, 92 S.Ct. 1014, 31 L.Ed.2d 374 (1972). As noted by the Eleventh Circuit Court of Appeals:

> "The key inquiry becomes whether the error was harmless beyond a reasonable doubt within the meaning of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1976)."

Grizzell v. Wainwright, 692 F.2d 722, 726 (11th Cir. 1982).

Notwithstanding the lower court's reliance on Chapman v. California, which is the unmistakable guiding authority upon

which this case must be resolved, Petitioner maintains that an erroneous "conjectural standard" was employed. In reality, Petitioner's argument is no more than an attack on the wisdom of the standard of measuring harmless error as established by Chapman v. California. In the lower court's Chapman v. California analysis, the court relied on several Fifth Circuit cases which applied the Chapman v. California harmless error rule to factual settings similar to the case at bar; e.g., Harryman v. Estelle, 597 F.2d 927 (5th Cir. 1979), cert. denied, 449 U.S. 860, 101 S.Ct. 161, 66 L.Ed.2d 76 (1980) and Zilka v. Estelle, 529 F.2d 388 (5th Cir. 1976). Each of the authorities apply the appropriate Chapman v. California harmless error rule. In fashioning the harmless error rule in Chapman v. California, the Supreme Court stated:

> " . . . There is little, if any, difference between our statement in Fahy v. State of Connecticut about "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction" and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our *Fahy* case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

386 U.S. 18, 24, 87 S.Ct. 824, 828. This statement of the rule was reiterated virtually verbatim in the Eleventh Circuit's concluding paragraph:

> Whether the jury would believe Grizzell, no one can tell. But he was entitled to have his testimony weighed by the jury unencumbered by the unconstitutional convictions. The jury was instructed specifically that the convictions could be used to

> evaluate his credibility. The district court correctly decided that there is a reasonable possibility that the constitutionally infirm evidence might have contributed to the jury's decision as to credibility, and hence to the conviction.
>
> AFFIRMED.

692 F.2d 722, 727.

Thus, it is readily apparent that the court below did not use the wrong standard of review as alleged by Petitioner.

As to Petitioner's argument regarding United States v. Frady, supra, Respondent notes initially that Frady was not proffered as authority by Petitioner in the court below. In any event, the case at bar is not a Frady case and thus did not require citation in the lower court's opinion. Frady involved an analysis of the applicability of the "plain error" standard in conjunction with a 28 U.S.C. §2255 collateral attack. The policies espoused in Frady are not offended by the lower court's opinion. The Frady decision does not change the fact that this case boiled down to a judgment call under Chapman v. California.

II. THE DECISION OF THE LOWER COURT DOES NOT OFFEND THE PROVISIONS OF 28 U.S.C. §2254(d).

Petitioner maintains that the courts below failed to accord the state court ruling the deference due under 28 U.S.C. §2254(d) and Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981).

Petitioner overlooks the fact that the state court made no factual determination to which deference was due. The "finding" made by the state court was a legal determination that the error was harmless. The state court did not refer to Chapman v. California, supra, or any other authority. Moreover, the state court did not explicitly acknowledge that an error of constitutional magnitude occurred in the trial. To the best

knowledge and belief of the undersigned, Petitioner did not concede constitutional error until this case reached the United States District Court. In any event, there are no disputed facts in the case. The facts which gave rise to the constitutional error were not contested. The thrust of Petitioner's defense on the merits in the court below was that the error was harmless within the meaning of Chapman v. California. The court below accepted the given historical facts of the case. The court below then applied accepted federal constitutional standards to the given facts and adjudged that the harmless error rule of Chapman v. California could not reasonably be invoked. This is a far cry from the evil sought to be remedied by Sumner v. Mata, supra, where a federal court declines to accept a factual determination of a state court without first stating which of the factors enumerated in 28 U.S.C. §2254(d) the federal court perceives as justification for rejecting the state factual determination.

Even if the district court below erred in not paying express deference to the state court ruling, the Eleventh Circuit cured the error. The Eleventh Circuit noted the state court ruling and stated, in effect, that the state ruling could not be reconciled with federal constitutional law. 692 F.2d 725. The reasoning which followed in the Eleventh Circuit's opinion was tantamount to concluding that the state determination is not fairly supported by the record, i.e., valid basis for rejecting the state determination pursuant to 28 U.S.C. §2254(d)(8).

III. NO CONFLICT EXISTS BETWEEN THE DECISION BELOW AND UNITED STATES v. TUCKER.

Petitioner argues that the lower court "decided a federal question in a way that conflicts with the decision of this court in Michigan v. Tucker, 404 U.S. 443 (1972)."

Presumably Petitioner refers to United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972). No such conflict exists. As noted in Loper v. Beto, 405 U.S. 473, 483, Tucker involved only the prohibition against use of prior invalid convictions to enhance punishment. Tucker does not even purport to establish law with respect to the use of such convictions to support guilt. Thus, Petitioner's argument ignores the decision of Loper v. Beto which established the principle of law upon which this case is premised.

IV. THE LOWER COURT'S CHARACTERIZATION OF GRIZZELL'S TESTIMONY IS ACCURATE.

Petitioner complains that the lower court's characterization of Grizzell's alibi testimony as demonstrating no internal inconsistencies is in error. Clearly that is not the character of reason which justifies granting the writ. But the lower court's statement in this regard was entirely accurate. The point which the lower court sought to emphasize is that Respondent's trial testimony was not implausible on its face, unlike other Loper v. Beto cases where a defendant's testimony was self-impeaching. Although not expressly mentioned by the lower court, it is a matter of record that the state was content to impeach Respondent's testimony solely by reference to convictions subsequently held invalid. Thus, the only apparent reason for rejecting Respondent's testimony was the unconstitutional impeachment.

V. THE LOWER COURT APPROPRIATELY DISTINGUISHED ZILKA v. ESTELLE, 529 F.2d 388 (5th Cir. 1976).

Petitioner's final argument is no more than an academic debate over whether Zilka v. Estelle, 529 F.2d 388 (5th Cir. 1976) supports their position or Respondent's as the court decided. The lower court thoroughly explored the facts of

Zilka and the law to be gleaned therefrom. The lower court correctly decided that the numerous factual distinctions between Zilka and the case at bar mandated the opposite result reached by the Zilka court. Petitioner argued to the Magistrate, the District Court and the Circuit Court below that Zilka supports his position that the error was harmless. Each and every court below disagreed with Petitioner's argument. The thorough comparison of Zilka and the case at bar in the lower court's opinion demonstrates a thoughtful and correct decision. In any event, Petitioner has failed to even suggest how this point is indicative of the character of reason justifying granting the writ.

CONCLUSION

This case does not present a question of gravity or general importance. The issues raised by Petitioner are not recurring or of great public concern. In its simplest form the case may be characterized as a judgment call that the constitutional error in Respondent's conviction was not harmless. That Petitioner disagrees with the judgment of each federal court below is not grounds for granting the discretionary writ.

Accordingly, Respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

H. JAY STEVENS
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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Wallace E. Albritton, Assistant Attorney General, The Capitol, Suite 1502, Tallahassee, Florida 32301, by mail, this 25th day of April, 1983.

Howard W. Skinner
Assistant Federal Public Defender

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Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, ALFRED EUGENE GRIZZELL, pursuant to Rule 46 and 18 U.S.C. §3006A (d)(6), asks leave to file the attached Response To Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit without prepayment of costs, and to proceed *in forma pauperis*. Respondent was represented in the district court and the court of appeals by counsel appointed under the Criminal Justice Act of 1964, as amended.

Respectfully submitted,

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Counsel for Respondent

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Howard W. Skinner
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